Supreme Court, U.S.
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No. 95-1327

In The

Supreme Court of the United States

October Term, 1995

IN RE CARGILL, INCORPORATED,

Petitioner.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Can the Petitioner, seeking recusal of a district court judge, sustain its heavy burden of demonstrating that there are "special and important reasons" to grant review on writ of certiorari where the Petitioner expressly waived any objection to the judge's continuing to preside, where the Petitioner "lay in wait" following its waiver until after an adverse decision on the merits to seek the judge's recusal, and where partiality is not demonstrated?

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Respondents Frederick Ashmore, David Boya, William Simone, and Richard Simeone, ("Respondents") respectfully pray that the writ of certiorari sought by Petitioner Cargill, Inc., be denied.

STATEMENT OF THE CASE

Rather than air the merits of its doubtful defense in a trial, Cargill (hereinafter "Petitioner") has sought, for two years, to translate its own entrenched theories about the law of recusal and waiver into favorable review. In the face of proper denials of its petitions at every turn, the Petitioner here again tries to mischaracterize a small and transitory event as a need to save the national fabric from disintegration. Despite the sensational flourishes with which the Petitioner embellishes its attempt, it has shown no special or important reason for review.

This Court should deny Petitioner's Petition for Writ of Certiorari for three separate reasons: First, the undisputed facts and circumstances surrounding Attorney Petruccelli's brief and discrete representation of the district court judge in an unrelated matter do not rise to the level at which his "impartiality might reasonably be questioned" under the standard of 28 U.S.C. § 455(a). Second, Petitioner expressly waived any objection to the district court judge's continuation in this matter after his full disclosure pursuant to 28 U.S.C. § 455(e). Third, the untimeliness of Petitioner's motion for recusal again waived any objection to the district court judge's continuing to preside over this matter. Without regard to these issues, the district court's order denying Petitioner's motion to dismiss dated January 19, 1994 must stand and remain effective under current law, since Petitioner has not established that enforcement of that order would be unjust.

STATEMENT OF FACTS

Respondents Frederick Ashmore, David Boya, Richard Simeone and William Simone (hereinafter "Respondents") filed suit in the federal district court in the District of Maine against Petitioner on July 23, 1993, seeking damages pursuant to the Robinson-Patman Antidiscrimination Act (hereinafter "Robinson-Patman Act") and under common law theories of breach of contract and promissory estoppel. The Respondents have alleged that they were wrongfully fired by Petitioner because of their reluctance and/or outright refusal to engage in anti-competitive activities prohibited by the Robinson-Patman Act. On September 2, 1993, Petitioner filed a motion to dismiss arguing that the Respondents lacked standing to maintain an action under the Robinson-Patman Act.

On January 12, 1994, a conference was held during which the district court judge informed counsel of record for all parties that he had recently retained the services of Attorney Gerald F. Petruccelli, a partner in the law firm representing the Respondents in this action. Both parties participated in this conference, Petitioner through its attorneys of record, John J. O'Leary, Jr. and Charles S. Einsiedler, Jr., and Respondents through their attorneys of record, Daniel W. Bates and Kenneth D. Keating. Contrary to Petitioner's assertion of factual interpretation, the district court complied with 28 U.S.C. § 455(e).

At that conference, the district court judge disclosed that he became involved in a "minor controversy" regarding a purchase and sale of a new house on December 19, 1993. Transcript of January 12, 1994 Conference of Counsel (App. 34a). On December 19, the district court judge telephoned Attorney Petruccelli seeking advice and representation, and on December 20 Attorney Petruccelli accepted that representation. The

district court judge has since indicated that he was not "consciously aware" that the law firm of Petruccelli & Martin was involved in this matter until the Clerk so informed him after Attorney Petruccelli had undertaken to represent the district court judge. Memorandum of Decision and Order dated May 12, 1994 (App. 57a). The district court judge and Mr. Petruccelli met on December 21 "for about 45-50 minutes" during which time the district court judge indicated that he sought a "quick resolution" to the matter. App. 34a. At the conference of counsel, the district court judge indicated that there had been phone conversations between himself and Attorney Petruccelli on December 22, 23, 28 and 29 of "four or five minutes a piece." App 34a. The district court judge further disclosed that "the matter was resolved to my satisfaction" on January 6, 1994. App. 34a. Attorney Petruccelli immediately rendered a bill reflecting "the usual rate, usual fee computed at the usual hourly rate for the hours of devotion to the case that he would charge to any stranger off the street." App. 34a-35a. On January 10, the bill was paid in full. App. 35a. Following this disclosure, Respondents, by and through their attorney of record, waived any objection to the district court judge's continued participation in the case. The district court judge then indicated that he had never had any conversation about that representation with Attorney Bates or Attorney Keating. App. 35a. Immediately thereafter, Petitioner, by and through its counsel of record, also waived any right that it may have had to object to the district court judge's continuing to preside in this matter. (Attorney O'Leary, an experienced litigator and partner at the law firm of Pierce, Atwood, Scribner, Allen, Smith & Lancaster, and counsel of record for Petitioner, stated: "[s]peaking for the defense, there is no objection." App. 35a). The court then indicated that it intended to issue a decision on Petitioner's motion to dismiss "within a week or so." App. 36a.

This conference took place on January 12, 1994.

Immediately after it, Attorney O'Leary telephoned Attorney Bernhardt Wruble, who also represents Petitioner, to summarize the conference (*see* Affidavit of Attorney O'Leary, App. 102a). Despite the fact that Attorney O'Leary, Attorney Einsiedler and Attorney Wruble all were aware on January 12, 1994 that the district court judge, relying on Petitioner's waiver, intended to issue a substantive order regarding Petitioner's motion to dismiss as early as within one week, not one of them ever objected or gave any notice to the court or the Respondents disputing the validity and effectiveness of its waiver, or seeking its withdrawal.

As it had predicted, the district court issued a "Memorandum of Decision and Order Denying Defendants' Motion to Dismiss" within a week of the conference, on January 19, 1994.[1] However, it was not until *February 13, 1994*, over one month after Petitioner's waiver of objections at the conference and three weeks after the court's issuance of the order denying Petitioner's motion to dismiss, that Petitioner notified the district court of its intention to challenge the validity of its waiver and to seek the recusal of the district court judge.

On February 15, 1994, Attorney O'Leary filed a motion for leave to withdraw from this matter. Then, on February 25, Petitioner filed a motion to certify for interlocutory appeal the January 19, 1994 order denying Petitioner's motion to dismiss. On March 9, 1994, Petitioner filed a formal motion seeking the district court judge's recusal and moving the court to vacate its January 19, 1994 order denying Petitioner's motion to dismiss.

By order dated May 12, 1994, the district court denied

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1. Although Petitioner repeats several times its assessment that this order is unsupported by applicable legal authority, this is not so. *See Ashmore v. Northeast Petroleum, Division of Cargill, Inc.*, 843 F. Supp. 759 (D.Me. 1994).

Petitioner's motion for recusal (App. 55a) and by order dated June 21, 1994, the court denied Petitioner's motion to certify the court's January 19 order denying Petitioner's motion for dismissal for interlocutory appeal. Only on *July 19, 1994*, did Petitioner file the petition for writ of mandamus with the Court of Appeals seeking the district court judge's recusal and the withdrawal of the order of January 19, 1994 denying Petitioner's motion to dismiss. Following this, on August 2, 1994, Petitioner filed a motion to transfer this action to the District of Massachusetts. Respondents timely objected to the motion. The district court has taken no action on this matter since that time.

On November 23, 1994, the district court judge notified this court pursuant to Fed.R.App.P. 21(b) that he would not appear in the mandamus proceeding and that he stood by his decision on Petitioner's motion for recusal entered on May 12, 1994.

Respondents opposed Petitioner's petition for writ of mandamus. The Court of Appeals denied the petition for writ of mandamus at *In re Petitioner, Inc.*, 66 F.3d 1256 (1st Cir. 1995) (App. 14a). Upon Petitioner's petition for rehearing en banc, the Court of Appeals denied the writ of mandamus on November 16, 1995 (App. 12a).

REASONS FOR DENYING THE WRIT

I.

THE OPINION OF THE COURT OF APPEALS WAS PROPER, AND IN CONFORMANCE WITH APPLICABLE LAW.

Because prerogative writs unsettle the mechanics of the judicial system by accelerating appellate intervention, fostering piecemeal review and disturbing the historic relationship

between trial and appellate courts, (App. 20a) the Court of Appeals properly held that the Petitioner did not meet the high standard for issuance of a writ of mandamus. Petitioner showed "neither that it is clearly and indisputably entitled to the writ nor that it faces an intolerable risk of irreparable harm" by denial of the writ. (App. 22a). The court held that the judge conformed to the requirements of 28 U.S.C. §§ 455(a) and (e) and that local counsel's waiver was ratified by Petitioner's silence and inaction after learning of it. (App. 23a). Far from being in conflict on the point, the circuits are in harmony:

> After all, it is common ground that civil litigants ordinarily are bound by their attorneys' tactical judgments" *see, e.g. Brody v. President & Fellow of Harvard Coll*, 664 F.2d 10, 12 (1st Cir. 1981) (holding, on particular facts, that client would not be allowed "to second guess his attorney's waiver") *cert. denied*, 455 U.S. 1027 (1982), and waivers based on silence are standard fare, *see e.g., United States v. Nobel*, 696 F.2d 231, 237 (3d Cir. 1982) (finding waiver under § 455(e) based on party's failure to make a timely objection once the basis for disqualification was fully disclosed), *cert. denied*, 462 U.S. 1118 (1983).

The contested waiver was thus of both local and lead counsel, and properly led to a finding that Petitioner did not demonstrate the "clear and indisputable" right to relief necessary for entitlement to a writ of mandamus. *In re United States*, 666 F.2d 690 (1st Cir. 1981) (citing *Kerr v. United States District Court*, 426 U.S. 394, 403, 96 S.Ct. 2119, 2124, 48 L.Ed.2d 725 (1976)).

This proper conclusion leads to a second conclusion here: that Petitioner fails to satisfy the standard for writ of certiorari. There are no special or important reasons for the granting of such a writ. None of the illustrations in Supreme Court Rule 10 are implicated by the facts or lower court decisions here. No conflicts in lower court decisions seriously justify review. On the contrary, the meritless and transitory reasons for review argued by Petitioner in this case cannot establish the degree of public importance or need for prompt resolution necessary for such review. The petition requested should be denied on this basis.

II.

THE DISTRICT COURT JUDGE CONFORMED HIS ACTIONS METICULOUSLY TO 28 U.S.C. § 455(e).

Title 28 U.S.C. § 455 governs the disqualification of district court judges. § 455(a) provides that: "[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." This court has previously held that the proper analysis under § 455(a) depends upon:

> whether the charge of lack of impartiality is grounded on facts that would create reasonable doubt concerning the judge's impartiality, not in the mind of the judge himself or even necessarily in the mind of the litigant filing the motion under 28 U.S.C. § 455, but rather in the mind of the reasonable man.

Panzardi-Alvarez v. United States, 879 F.2d at 983 (1st Cir. 1989)

(quoting *United States v. Cowden*, 544 F.2d 257, 265 (1st Cir. 1976), *cert. denied*, 430 U.S. 909 (1977)).

In concert with other circuits, the First Circuit has repeatedly warned that § 455 is not a device for parties to use in an effort to select a judge of their choosing. *See United States v. Cowden*, 545 F.2d at 265.

> [D]isqualification is appropriate *only* if the facts provide what an objective, knowledgeable member of the public would find to be a reasonable basis for doubting the judge's impartiality. Were less required, a judge could abdicate in difficult cases at the mere sound of controversy or a litigant could avoid adverse decisions by alleging the slightest of factual bases for bias. *See* H.Rep.No. 1453, 1974 U.S. Code Cong. & Admin. News, *supra*, at 6355. This restricted mandate to disqualify is calculated to induce a judge to try the narrow path between timidity and tenacity.

In re United States, 666 F.2d at 690-691 (emphasis added). The law is clear that "a judge must be presumed to be qualified, and there must be a substantial burden upon the affiant to show grounds for believing the contrary." *In re Union Leader Corp.*, 292 F.2d at 389. Furthermore, "a trial judge must hear cases unless some reasonable factual basis to doubt the impartiality or fairness of the tribunal is shown by some kind of probative evidence." *Blizard v. Frechette*, 601 F.2d 1217, 1221 (1st Cir. 1979). "There is as much obligation upon a judge not to recuse himself when there is no occasion as there is for him to do so when there is." *In re Union Leader Corp.*, 292 F.2d at 391. *See also United States v. Burger*, 964 F.2d 1065, *on remand*, 809 F.

Supp. 851 (10th Cir. 1992). "[A] judge once having drawn a case should not recuse himself on an unsupported, irrational, or highly tenuous speculation; were he or she to do so, the price of maintaining the purity of appearance would be the power of litigants or third parties to exercise a negative veto over the assignment of judges." *In re United States*, 666 F.2d at 694. "Litigants are not entitled to have a judge disqualify himself merely because they fear an adverse decision." *United States v. Cowden*, 545 F.2d at 257. *A fortiori*, a litigant is not entitled to recusal because the judge has made an adverse decision.

The same standard applies even when the judge has had some ties to a party or its counsel. "The mere association of a judge with a party, without indication that the judge stands to obtain financial or other gain from a particular outcome, may similarly be insufficient to mandate disqualification." *Brody v. President & Fellows of Harvard College*, 664 F.2d 10, 11 (1st Cir. 1981) *cert. denied*, 455 U.S. 1027 (1981). Furthermore, "where the interest asserted bears only a tangential relationship to the subject matter of this suit, the alleged bias is even further attenuated." *Id.* at 12 (citing *Disqualification of Judges and Justices in the Federal Courts*, 86 Harv. L. Rev. 736, 754 (1973)). Adverse evidentiary rulings do not by themselves demonstrate impermissible bias. *Blizard v. Frechette*, 601 F.2d at 1222. Furthermore, a mistake of law is not evidence of bias. *In re Cooper*, 821 F.2d 833, 843 (1st Cir. 1987) (*per curiam*). "As the terms of section 455's additional explicitly mandated bases for recusal suggest, a reasonable suspicion of bias will usually arise only in the presence of such factors as a financial or strong personal interest in one of the *litigants*." *Brody v. President & Fellows of Harvard College*, 664 F.2d at 11 (emphasis added).

> The statutory standard puts to the judge a question about the objective state of the legal and lay culture. The Court must consider

> whether an astute observer in either culture would conclude that the relation between judge and lawyer (a) is very much out of the ordinary course, *and* (b) presents a potential for actual impropriety if the worst implications are realized.

In re Georgetown Apartments, Ltd., 143 B.R. 557, 559 (9th Cir. BAT 1992) (emphasis added).

Petitioner does not in fact claim that the district court judge is partial to the Respondents: only that there is the appearance of partiality to Attorney Petruccelli. A bias toward or against an attorney does not require disqualification of the judge in the absence of a showing of bias for or against a party. *See In re Cooper*, 821 F.2d at 839; *also see Gilbert v. City of Little Rock*, 722 F.2d 1390, 1398-1399 (8th Cir. 1983), *cert. denied*, 466 U.S. 972, 104 S. Ct. 2347, 80 L. Ed. 2d 820 (1984). This court has stated that situations in which a bias against an attorney would suggest a bias against that attorney's clients are "rare" and happen only under "exceptional circumstances." *In re Cooper*, 821 F.2d at 839. "As a general rule, bias against a party [as opposed to a party's lawyer] must be shown." *Panzardi-Alvarez v. United States*, 879 F.2d at 9.

> Even, however, if one may assume the survival of some residue of gratitude after such a period, it is beyond contemplation that such gratitude would be of the weght necessary to cause a judge to jettison his impartiality and, in open court day after day to violate his deepest professional and ethical commitments as a judge.

In re United States, 666 F.2d at 696.

Petitioner's argument comes down to this: the fact that the district court judge retained Attorney Petruccelli to represent him in a very minor controversy would suggest to a reasonable person a clear and unmistakable favorable bias toward Attorney Petruccelli; this bias would then translate into a clear and unmistakable bias in favor of every member of the firm of Petruccelli & Martin; and this bias would in turn translate into a clear and unmistakable bias in favor of each client of any member of the firm of Petruccelli & Martin. To state the heart of Petitioner's position in this form is to refute it.

No reasonable person could or would consider Attorney Petruccelli's brief representation as creating an appearance of partiality inuring to the benefit of Attorney Petruccelli's partners' clients. The cases are undivided in supporting Respondents' position that it was not an abuse of discretion for the district court judge to deny Petitioner's motion for recusal.

The law is also clear that in a situation in which the only potential basis for recusal is that a judge's impartiality might reasonably be questioned (§ 455(a)), a judge may continue to preside over a case if the parties waive any objections following a full and complete disclosure of the facts surrounding the potentially disqualifying issue. Title 28 U.S.C. § 455(e).

The facts of the waiver are undisputed. At the January 12, 1994 conference of counsel, Petitioner was represented by Attorney O'Leary and Attorney Einsiedler, both experienced litigators and partners in Maine's largest law firm, Pierce, Atwood, Scribner, Smith, Allen & Lancaster. There has been no suggestion that Petitioner's counsel lacked legal competency. Nor is there any serious argument that the district court judge failed to fully disclose all relevant facts and circumstances concerning the representation by Attorney Petruccelli of the district court judge. After that disclosure, Attorney O'Leary

stated: "[s]peaking for the defense, there is no objection." (App. 35a).[2]

Unable to avoid the fact of the waiver, Petitioner questioned the adequacy of the district court judge's disclosure. But "[a] judge is required merely to disclose the basis for disqualification, not every incident or factual detail which might contribute to the overall impression of partiality." *Hall v. Small Business Administration*, 695 F.2d 175 (5th Cir. 1983). "The statute in its present form, unlike the code of judicial conduct, does not regulate the detailed manner in which the waiver must be effected." *United States v. Nobel*, 699 F.2d 231, 236-237 (3rd. Cir. 1982) *cert. denied*, 462 U.S. 1118 (1983). Judged by that standard, there can be no serious argument that the district court judge's disclosure was inadequate in any way. Furthermore, the record is clear that Attorney O'Leary did not seek any further detail before he stated that his client had no objection.

The district court judge did not prevent counsel from having an opportunity to confer with their client outside the presence of the court. Indeed, the judge indicated that he fully intended to give the parties an opportunity to consider the issue, but in fact both counsel voluntarily and unequivocally announced that they had no objection to the district court judge continuing to preside. Because of counsels' consent, there was no longer any need to discuss how much time was needed for consultation.

Petitioner's statement that "Petitioner's local counsel can

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2. Petitioner appears to suggest that the action of a party's "local" counsel does not become effective and binding upon the party until that action has been formally ratified by every other attorney representing that party and by the party itself. Petitioner has failed to support this novel proposition with any statute or case. Further, the First Circuit Court of Appeals found ratification from Petitioner's lengthy inactivity following the full disclosure and waiver.

hardly be viewed as having given an effective, authorized waiver" is unsupported by the facts, by 28 U.S.C. § 455(e), or by any case. If Petitioner has any dispute as to the adequacy of its representation, the tactical decisions made by its counsel, or the extent of his authority, it must take up those issues with its former counsel at a different time and place. A party is bound by the actions and decisions of its counsel. *Brody v. President & Fellows of Harvard College*, 664 F.2d at 12. ("Even if the judge's education were a subject required to be disclosed by § 455(a), it is too late for appellant to second guess his attorney's waiver; litigants are ordinarily bound by their attorney's tactical decisions."). Petitioner has cited no authority to suggest otherwise.

III.

PROPER DENIAL OF A WRIT OF MANDAMUS BECAUSE OF PETITIONER'S FAILURE TO SUSTAIN ITS BURDEN DOES NOT CONSTITUTE AN "ABDICATION" OF THE COURT'S POWERS, AS PETITIONER SUGGESTS, BUT RATHER A PROPER EXERCISE OF THEM.

The Petitioner below failed to meet its burden because it showed neither a clear entitlement to relief nor a favorable balance of equities. (App. 22a). In doing so, it properly characterized Petitioner's failure to act as a waiver.

Although there is no specific timing requirement within Title 28 U.S.C. § 455, courts have repeatedly held that motions for recusal must be made in a timely manner. "The law is well settled that one seeking the disqualification of the judge must do so at the earliest moment after knowledge of the facts demonstrating the basis for such disqualification." *United States v. Kelly*, 519 F. Supp. 1029, 1051 (D. Mass. 1981),

mandamus denied, In re United States, 366 F.2d at 690. "[A] party, knowing of a ground for requesting disqualification, can not be permitted to wait and decide whether he likes subsequent treatment that he receives." *In re United Shoe Machinery Corp.*, 276 F.2d 77, 79 (1st Cir. 1960). Courts must be vigilant to insure that litigants are not allowed to "use recusal motions for strategic purposes." *Preston v. United States*, 923 F.2d 731, 733 (9th Cir. 1991); *see also E & J Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1295 (9th Cir. 1992).

In *United States v. Nobel*, 699 F.2d at 231, the trial court put counsel on notice of a potential appearance of partiality. The disgruntled party argued on appeal that the court's disclosure was inadequate. The Third Circuit Court of Appeals wasted little time in dispensing with this issue. Noting that counsel made no request for additional information, the court stated that "the information disclosed was sufficient to put defense counsel on notice of the relationship between the judge and the INA." *Id.* at 236. The court then held that under such circumstances, counsel's "*failure to object* constitutes a waiver of disqualification covered by § 455(e)." *Id.* at 236 (emphasis added).

In this case, a conference of counsel was noticed on January 11, 1994, for the following day. At that conference, the district court judge advised Attorneys Bates and Keating, on behalf of Respondents, and Attorneys O'Leary and Einsiedler, on behalf of Petitioner, of the facts concerning the brief representation by Attorney Petruccelli. Respondents and Petitioner then voluntarily and unequivocally stated that there was no objection to the district court judge's continuing to preside over this matter. Immediately thereafter, the district court judge informed counsel for both parties that the decision on Petitioner's motion for dismissal would be issued within the next week or so.

It is undisputed that on that same day (January 12, 1994), Attorney O'Leary notified Attorney Wruble of (1) the district court judge's disclosure, (2) Petitioner's express waiver, and (3) the likely issuance of a decision on Petitioner's motion to dismiss as soon as one week thereafter. (App. 95a, 102a). Prior to January 19, 1994, the date of the district court's decision denying Petitioner's motion to dismiss, neither the court nor Respondents received any notice whatever from Petitioner that there was even the possibility of a dispute as to the adequacy or legitimacy of Petitioner's waiver. Then, on *February 13, 1994*, Attorney Wruble mailed a detailed "letter" to the court demanding the district court judge's recusal and demanding that the district court judge withdraw his order denying Petitioner's motion to dismiss.

Despite Petitioner's excuses ("snowstorm" and "federal holiday"), it is clear that Petitioner had ample opportunity to communicate, by phone if nothing else, with the clerk at least to put the court on notice that it wanted a chance to consider revoking its express waiver. Even though it was fully aware that the district court judge would be issuing a substantive decision within the next week or so, Petitioner chose to remain silent for several weeks, await the district court judge's ruling, and then notify the court that it disputed the validity of its counsel's waiver. Despite its current protests to the contrary, Petitioner need not have filed a complete brief immediately; it needed only to notify the court that there was an issue regarding the adequacy of its counsel's waiver. It did not do so. As Judge Aldrich has said:

> A judge cannot be acceptable if he finds in your favor, but unqualified if he finds against you. This is classic heads-I-win, tails-you-lose. It was not improper to file a motion for reconsideration, but it was totally improper

> procedure to present it while consciously reserving recusal as an ace in the hole. . . .

Ricci v. Key Bancshares of Maine, Inc., 111 F.R.D. 369, 377 (D. Me. 1986) (Aldrich, J.).

The crucial issue in these cases is whether the party having the knowledge has attempted to use that knowledge to manipulate the system in order to allow it two bites at the apple. The Court of Appeals found that Petitioner may well have done so, though this finding is not essential to its finding that Petitioner twice waived its right to protest. Attorney O'Leary, Attorney Einsiedler and Attorney Wruble all knew on January 12, 1994 that the district court judge had raised the issue of recusal. They knew, too, that Petitioner had waived any objection to the district court judge's continuing to preside and that the district court judge would be issuing a substantive decision on Petitioner's motion to dismiss as early as a week later. Indeed, Petitioner has never even alleged or asserted that it decided to move for recusal prior to receiving the January 19, 1994 decision denying Petitioner's motion for dismissal. Such post-hoc reversal of a tactical decision is precisely what the law does not countenance.

Stripped of its garnish, Petitioner's argument must be that although the district court judge was acceptable if he found in Petitioner's favor, he must be disqualified because he found in Respondents' favor, and that it was proper for Petitioner to postpone the disqualification issue until the judge had ruled. Indeed, Petitioner conceded as much in the petition for writ of mandamus:

> Once the district court indicated that it intended to subject Petitioner to a full-blown antitrust trial under threat of treble damages

> without giving this Court [of Appeals] an opportunity to address its controversial antitrust standing decision, and given the continuing issue of the appearance of judicial partiality, Petitioner has had little choice but to petition this Court for a Writ of Mandamus.

Petitioner's petition p. 14.

To grant Petitioner's petition under these facts "would encourage parties to withhold recusal motions pending the resolution of their disputes on the merits, and then if necessary invoke § 455 in order to get a second bite at the apple." *E & J Gallo Winery v. Gallo Cattle Co.*, 967 F.2d at 1295.

Also, as the Court of Appeals points out, (App. 33a) an end-of-case appeal is entirely appropriate. In order to insure that a writ of mandamus "only will issue in extraordinary circumstances, this court has required that a party seeking issuance have no other adequate means to attain the relief he desires," *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 35, 66 L.Ed. 193, 101 S.Ct. 188 (1980) (per curiam). Because an end- of-case appeal is a matter of right as opposed to discretion, Petitioner has other means to seek to effectuate the relief it desires here.

IV.

"ISSUES OF TIMING" DO NOT RENDER THE COURT OF APPEALS' DECISION IMPROPER.

The issue of Petitioner's failure to take any action when it knew of the district court's disclosure and its counsel's waiver, (January 12, 1994, in the case of lead counsel, and January 14, 1994 in the case of the corporate Petitioner's in-house counsel,

App. 95a, 98a, and 102a) is fully explicated by the court below. Though lead counsel claims to have been hampered by a snowstorm in Washington, D.C., no explanation is provided as to why Maine counsel did not simply notify the court in a timely fashion. The Court of Appeals quite properly followed the reasoning in *Apple v. Jewish Hosp. & Medical Ctr.*, 829 F.2d 326, 334 (2nd Cir. 1987) ("a movant may not hold back and wait, hedging its bets against the eventual outcome") and *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1472 (11th Cir. 1986) (Counsel, knowing the facts claimed to support a § 455(a) recusal for appearance of partiality may not lie in wait, raising the recusal issue only after learning of the court's ruling on the merits.") *cert. denied*, 481 U.S. 1016 (1987) (App. 32a). The First Circuit simply and rightly refused to countenance such behavior in this case.

V.

THE OPINION OF THE COURT OF APPEALS DOES NOT CONFLICT WITH THE HOLDING IN *LILJEBERG* ON MATTERS OF REMEDY.

Petitioner argues that if this court were to rule that the district court judge should have recused himself, the district court's order of January 19, 1994 denying Petitioner's motion to dismiss must be withdrawn. In *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988), the Supreme Court noted that § 455 does not, on its own, authorize the reopening of closed litigation. *Liljeberg* at 863. Nor does the statute authorize the court to withdraw an order. And although Petitioner originally moved the district court to recuse itself *and* to vacate its order denying Petitioner's motion to dismiss, clearly the latter relief would have been prohibited. *El Fenix De Puerto Rico v. M/Y Johanny, etc. et al.*, No. 93-1493 slip op. at p. 13 (1st Cir. September 26, 1994) ("recused judge should take *no further action* except to enable administrative reassignment of the

case.") (emphasis added). The Supreme Court in *Liljeberg* directs a court facing such an issue to look for guidance to Rule 60(b)(6), aptly entitled "Relief from Judgment or Order."

Furthermore:

> where no actual bias is at issue, where the question is solely one of appearances, judicial actions already taken are not necessarily rendered invalid because of circumstances that violate § 455(a). As we read the Supreme Court's *Liljeberg* opinion, we are to fashion retrospective relief with an eye towards a just result.

In re Allied Signal, Inc., 891 F.2d 974 (1st Cir. 1989). *See also Duke v. Pfizer, Inc.*, 668 F. Supp. 1031 (E.D. Mich. 1987) (a new trial cannot be obtained merely based upon the fact that a judge should have been recused).

As stated in *Russell v. Lane*, 890 F.2d 947, 948 (7th Cir. 1989). "Both the need for finality and a common-sense aversion to frittering scarce judicial resources militate against an inflexible rule invalidating all prior actions of a judge disqualified under § 455(a)." *El Fenix De Puerto Rico v. The M/Y Johanny, etc. et al.*, slip op. at p. 13. *Also see United States v. Murphy*, 768 F.2d 1518, 1541 (7th Cir. 1985).

Petitioner disagrees with the district court judge's denial of its motion to dismiss on standing issues. It may pursue that disagreement through normal appellate channels. But it has not shown that enforcement of the order would be unjust; and that is the standard it must meet if it wishes to vacate the order now.

VI.

THE ISSUES PRESENTED DO NOT JUSTIFY CERTIORARI REVIEW.

It is Petitioner's burden to establish that the district court judge's refusal to recuse himself constituted an abuse of discretion and that Petitioner is indisputably entitled to the extraordinary relief of a writ of certiorari. Petitioner has failed to cite any case or statute which when applied to the undisputed facts of this case supports such relief, much less compels it. At bottom, it is clear that (1) the representation of the district court judge by Attorney Petruccelli does not create a reasonable basis for doubting the district court judge's impartiality in presiding over a case in which Attorney Petruccelli's partner's client is a litigant, (2) Petitioner's express waiver is fully effective, (3) Petitioner's conduct in waiting until after the substantive decision had been made on Petitioner's motion for dismissal constitutes a separate and distinct waiver, and (4) in any event, the district court judge's order denying Petitioner's motion to dismiss must stand.

CONCLUSION

Petitioner's motives and strategy are transparent. Following the district court's denial of Petitioner's motion to dismiss, Petitioner has used every procedural arrow in its quiver to circumvent or delay the effectiveness of that order. Petitioner's motion for recusal was denied on May 12, 1994. Petitioner waited to file its Petition for a writ of mandamus until after the district court judge's June 21, 1994 denial of Petitioner's motion to certify the standing issue for appellate review.

Plaintiff, a disgruntled and pertinacious

> litigant, seeks review of the court's Opinion and Order .... The short answer to this inarticulate allegation is that the disqualification statutes were never meant to serve as a substitution for reexamination, review or appeal where the alleged bias is predicated on an adverse ruling or decision in the past or possible expectation that a pending or present matter might be decided adversely.

Carbana v. Cruz, 595 F. Supp. 585 (D. P.R. 1984).

It has now been years since the Complaint was filed. At this point, because of Petitioner's seemingly endless array of motions, its petition for mandamus and the instant petition, the scheduling conference has yet to be held. In reality, Petitioner seeks appellate review of the district court judge's denial of its motion to dismiss. That cannot be accomplished under the guise of a petition for a writ of mandamus or certiorari seeking the district court judge's recusal.

For the reasons stated above, and on the basis of the further discussion of the facts and case law set forth in the opinion of the district court's denial of recusal and the First Circuit's majority opinion, the petition should be denied.

Respectfully submitted,

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